STATE OF MICHIGAN

COURT OF APPEALS

PATSY PARR,

Plaintiff-Appellant,

V

SRINI DUTT, M.D., SRINI DUTT, M.D., P.C., and EYE CENTER OF MICHIGAN,

Defendants-Appellees.

UNPUBLISHED
July 22, 2003

No. 239906
Genesee Circuit Court
LC No. 00-66917-NH

Before: Wilder, P.J., and Griffin and Gage, JJ.

PER CURIAM.

In this medical-malpractice action, plaintiff appeals by right the trial court's grant of summary disposition to defendants pursuant to MCR 2.116(C)(10). We reverse.

I. Facts and Proceedings

Defendant Srini Dutt, M.D.,[1] an opthamologist, treated plaintiff on several occasions beginning in June 1997 for various problems with her right eye. For several years prior to seeking treatment from defendant, plaintiff had experienced difficulties with her right eye, including the presence of a lesion on her upper right eyelid. Eventually, after several office visits, defendant referred plaintiff to a cornea specialist. The cornea specialist performed a biopsy on plaintiff's right eyelid in May 1998. Subsequent testing revealed the presence of sebaceous carcinoma. In August 1998, plaintiff's right eye and the surrounding tissue were removed[2] because of the cancer.

In her complaint filed January 4, 2000, plaintiff alleged that defendant failed to timely diagnose the cancer in her right eye. Plaintiff further alleged that her eye had to be removed because of defendants' negligence. With her complaint, plaintiff filed the affidavit of Dr. Charles Aronberg, in which Dr. Aronberg opined that defendants violated the standard of care

[1] Throughout this opinion, "defendant" refers to Srini Dutt, M.D.

[2] This procedure is known as exenteration.

and that, as a result of defendants' negligence, plaintiff "sustained severe and debilitating injuries, including the loss of her right eye."

In October 2001, defendants deposed Dr. Aronberg, plaintiff's only expert witness. Near the end of the deposition, counsel for defendants asked, "Is it your opinion, Doctor, that, had this been diagnosed in June of 1997, that she would not have had to undergo the exenteration?" Dr. Aronberg replied, "I don't know." Defense counsel briefly continued questioning on another topic. Plaintiff's counsel did not ask any follow-up questions.

Thereafter, defendants moved for summary disposition pursuant to MCR 2.116(C)(10), asserting that Dr. Aronberg's testimony did not raise a genuine issue of material fact concerning causation because Dr. Aronberg testified that he did not know whether the exenteration would have been necessary if defendant had made an earlier diagnosis. Plaintiff opposed defendants' motion by arguing that Dr. Aronberg's deposition was for discovery purposes only. Plaintiff also submitted a new affidavit in which Dr. Aronberg stated that he had reviewed his deposition testimony, including the question and answer cited by defendants in their motion, and:

> 4. Had I been asked further [during my deposition], I would have indicated that although I do not "know" whether exenteration would have been necessary, to a reasonable degree of medical certainty, it is more likely than not that exenteration would have been avoided.
>
> 5. It has been and is my position, as reflected in my Affidavit of Merit, that the negligence of the defendants is the approximate [sic] cause of [plaintiff's] damages.

The trial court granted defendants' motion, stating that under the facts presented here, summary disposition was required by this Court's decision in *Dykes v William Beaumont Hosp*, 246 Mich App 471; 633 NW2d 440 (2001). This appeal followed.

II. Standard of Review

We review de novo the trial court's decision regarding a motion for summary disposition. *Veenstra v Washtenaw Country Club*, 466 Mich 155, 159; 645 NW2d 643 (2002). A motion filed under MCR 2.116(C)(10) tests the factual sufficiency of the plaintiff's claim. *Id.* at 163. In its motion, the movant must identify the issues concerning which the movant believes genuine issues of material fact do not exist. *Id.*, citing MCR 2.116(G)(4). The party opposing a motion under MCR 2.116(C)(10) must present evidence of specific facts demonstrating that genuine issues of material fact exist. *Id.* The trial court must consider the evidence submitted by the parties, MCR 2.116(G)(5), but must consider the evidence "only to the extent that it is substantively admissible." *Id.* at 163-164, citing MCR 2.116(G)(6); *Maiden v Rozwood*, 461 Mich 109, 121; 597 NW2d 817 (1999).

III. Analysis

For ease of analysis, we first address plaintiff's argument that the trial court erred in granting summary disposition on the basis of testimony received during a "discovery only" deposition. We conclude that the trial court's reliance on "discovery only" deposition testimony

was not erroneous. The court rules concerning discovery permit "[a] party [to] take the deposition of a person whom the other party expects to call as an expert witness at trial." MCR 2.302(B)(4)(a)(ii). Similarly, MCR 2.302(B)(4)(d) permits "[a] party [to] depose a witness that he or she expects to call as an expert at trial." "Depositions or parts thereof shall be admissible at trial or *on the hearing of a motion* or in an interlocutory proceeding only as provided in the Michigan Rules of Evidence."[3] MCR 2.308(A) (emphasis added.) This rule is not expressly limited to depositions taken pursuant to MCR 2.302(B)(4)(d). Therefore, expert witness deposition testimony, whether obtained pursuant to MCR 2.302(B)(4)(a)(ii) or MCR 2.302(B)(4)(d), may be considered in support of a motion for summary disposition.[4] See also *Dykes, supra* at 475 n 5.

Plaintiff also argues that the trial court erred in granting summary disposition because Dr. Aronberg's affidavit raises a genuine issue of material fact concerning causation. Plaintiff asserts that because Dr. Aronberg stated in his affidavit that it was more likely than not, to a reasonable degree of medical certainty, that an earlier diagnosis would have prevented the exenteration, his affidavit does not contradict his deposition testimony in response to defense counsel's question. Therefore, plaintiff claims, this case is distinguishable from *Dykes, supra*. We agree.

"To prove medical malpractice, a plaintiff must show that the defendant's negligence proximately caused the plaintiff's injuries." *Dykes, supra* at 477, citing *Weymers v Khera*, 454 Mich 639, 647; 563 NW2d 647 (1997). Proximate causation is evaluated under a more probable than not standard, such that a plaintiff in a medical-malpractice action has the burden of proving that "'more likely than not, but for the defendant's conduct, the plaintiff's injuries would not have occurred.'" *Weymers, supra* at 647-648; 563 NW2d 647 (1997), quoting *Skinner v Square D Co*, 445 Mich 153, 164-165; 516 NW2d 475 (1994); see also MCL 600.2912a. In evaluating the effect of affidavit testimony submitted as "supplementary" to deposition testimony, we apply the well-settled rule "that a party may not raise an issue of fact by submitting an affidavit that contradicts the party's prior clear and unequivocal testimony." *Palazzola v Karmazin Products Corp*, 223 Mich App 141, 155; 565 NW2d 868 (1997), citing *Gamet v Jenks*, 38 Mich App 719, 726; 197 NW2d 160 (1972). Underlying this rule is the principle that statements of fact made in a "'clear, intelligent, unequivocal' manner" conclusively bind a party absent "any explanation or modification, or of a showing of mistake or improvidence."[5] *Gamet, supra* at 726; *Dykes, supra*

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[3] MRE 803(18) states that deposition testimony of an expert witness is not excluded from admissibility as hearsay.

[4] Contrary to plaintiff's assertions, MCR 2.302(C)(7) does not limit the use of deposition testimony to discovery and impeachment. Rather, MCR 2.302(C)(7) permits the trial court to issue a protective order providing "that a deposition shall be taken only for the purpose of discovery and shall not be admissible in evidence except for the purpose of impeachment." The record does not reveal that the trial court entered a protective order pursuant to MCR 2.302(C)(7) in this case.

[5] This rule extends to non-party witnesses. *Dykes, supra* at 481, quoting *Kaufman & Payton, PC v Nikkila*, 200 Mich App 250, 257; 503 NW2d 728 (1993).

at 480, quoting *Barlow v John Crane-Houdaille, Inc*, 191 Mich App 244, 250; 477 NW2d 133 (1991), quoting *Gamet, supra* at 726.

In *Dykes*, the defendant filed a motion for summary disposition after the plaintiff's expert witness testified at deposition that (1) he had "'no way of knowing'" whether the plaintiff's decedent would have lived longer if the plaintiff's decedent had received certain medication; (2) he could not state "'within a reasonable degree of medical certainty'" that performing a bronchoscopy or open lung biopsy during a particular time period would have changed the outcome; and (3) he could not state "'within a reasonable degree of medical certainty'" what the results of the bronchoscopy and open lung biopsy would have been. *Id.* at 477-479. In response to the defendant's motion, the plaintiff attempted to rely on her expert witness' affidavit of merit, previously filed with her complaint, to create a genuine issue of material fact. *Id.* at 479-480. The Court concluded that the affidavit could not defeat summary disposition. *Id.* at 480.

Although *Dykes* is similar to the instant case, it is distinguishable. The Court in *Dykes* noted that because the questions posed to the plaintiff's expert witness requested his opinions to "a reasonable degree of medical certainty," he was not asked to indicate absolute knowledge concerning causation. *Dykes, supra* at 479 n 6. Accordingly, the expert witness' affidavit of merit, which stated "'[w]ithin a reasonable degree of medical probability'" that the plaintiff's decedent "'would [have] had a greater then [sic] 50% chance of [survival]'" if the defendant had complied with the standard of care, contradicted his deposition testimony and could not create a genuine issue of material fact. *Dykes, supra* at 477-480.

In the present case, however, Dr. Aronberg's deposition testimony and his affidavit filed in opposition to defendants' motion do not contradict each other. Dr. Aronberg was asked during his deposition whether it was his opinion that plaintiff "*would not* have had to undergo the exenteration" if the cancer had been diagnosed in June 1997, and he testified that he did not know. This question, phrased in absolutes, is materially different from the relevant question in determining proximate cause in this case, which is whether it was *more likely than not* that plaintiff would have avoided the exenteration with a diagnosis in June 1997. In his affidavit, Dr. Aronberg opines that "to a reasonable degree of medical certainty," plaintiff more likely than not would have avoided exenteration with a diagnosis in June 1997. In this regard, Dr. Aronberg's affidavit clarifies and expands upon his deposition testimony, but does not contradict it. See *Wallad v Access BIDCO, Inc*, 236 Mich App 303, 312-313; 600 NW2d 664 (1999). Accordingly, Dr. Aronberg's affidavit is appropriately considered in opposition to defendants' motion, pursuant to MCR 2.116(G)(5). Viewing the evidence in a light most favorable to plaintiff, Dr. Aronberg's affidavit raises a genuine issue of material fact, and the trial court erred by granting summary disposition.

Reversed and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Kurtis T. Wilder
/s/ Richard Allen Griffin
/s/ Hilda R. Gage